

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

To be Argued by
JOSEPH I. STONE

77-1375

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1375

UNITED STATES OF AMERICA,

Appellee,

-v-

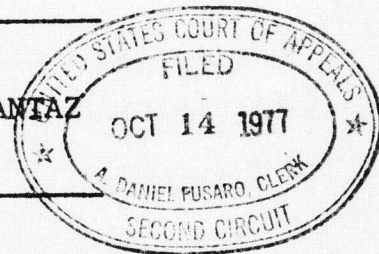
NICHOLAS PANTAZ,

Appellant.

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On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR APPELLANT NICHOLAS PANTAZ



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PRELIMINARY STATEMENT

The appellant, Nicholas Pantaz, appeals from a judgment of the United States District Court, Southern District of New York, before Hon. Edward Weinfeld, U.S.D.J., and a jury, of the crimes of distributing and possessing with intent to distribute quantities of methamphetamine and conspiracy to distribute said drug in violation of Title 21, U.S. Code, Section 846. The appellant was sentenced on August 18, 1977, to a term of one year in prison and three years special parole. He is currently enlarged on twenty-five thousand dollars personal recognizance bond pending determination of this appeal.

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STATEMENT OF FACTS

The defendant, Nicholas Pantaz, was indicted in a five count indictment along with George Ford, Hans Hartung and Laurie Nicosia. Nicosia pleaded guilty before trial but did not testify for either side. The jury found all defendants guilty.

The gist of the case occurred between undercover Drug Enforcement Agent Joseph C. Sullivan, who bought drugs directly from Laurie Nicosia. The first sale took place on April 7, 1977. There was a subsequent sale on April 12, 1977, and a sale and seizure on April 22, 1977.

There was a dispute as to whether or not Pantaz was ever seen before April 22, 1977. However, he was definitely seen and arrested on April 22, 1977. On that date a final sale was to take place with both Agents Sullivan and Petrucci acting in an undercover capacity (115R). Sullivan and Petrucci went to East Tremont and Randall Streets in the Bronx by government vehicle and met defendants Hartung and Nicosia who arrived in a blue Datsun (116R). Nicosia was the prime "mover" in the transaction which concerned the sale of a substantial quantity of methamphetamine for \$34,500. After this transaction was agreed upon between Nicosia (with Hartung present) and Petrucci and Sullivan, Nicosia and Hartung got into the Datsun, drove away and returned fifteen minutes later (118R). When they returned a third individual was in the automobile, later identified 2

by Petrucci as Pantaz (119R). The drugs given by Nicosia to Petrucci and Sullivan was offered in evidence subject to a motion by Pantaz to strike (120R). As soon as Sullivan received the package Petrucci gave a pre-arranged signal to arrest Hartun, Pantaz and Nicosia. It is conceded by Petrucci that there was no conversation that he overheard and the testimony of Sullivan indicated that he only saw Pantaz but never talked to him (70R). Pantaz was arrested without a search warrant and the items seized from him were admitted over objection. The trial court did not write any opinion, simply indicating that on the basis of all the circumstances, the agents had probable cause. After Pantaz' arrest, the agents obtained a search warrant for premises 530 Calhoun Avenue, (Ford's residence), and seized a suitcase with a substantial amount of narcotics and an airline ticket from Chicago to New York (government's Exhibit 2A, 187R). The suitcase had the name "Nicholas" on it. Pantaz had another airline ticket, (New York to Chicago), in his possession which was taken from his right rear pocket by Agent McMullan (151R). Pantaz' address and phone book were also taken. All items were received into evidence over objection. At the conclusion of the government's case a motion was made to strike all hearsay testimony attributed to Pantaz under the theory that there was no independent evidence which could link Pantaz to the conspiracy, or the theory that he was only a mere observer or simply present

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near an alleged drug transaction. The court denied all motions of all defendants concerning the conspiracy count (272R). The judge granted Pantaz' motion as to count three (the April 12th transaction) but denied his motion to dismiss the substantive counts for the drugs found at 530 Calhoun Avenue (count 5), and the substantive sale by Nicosia and Hartung, (count 4).

There were stipulations offered into evidence that the phone numbers found in Pantaz' address book were the phone numbers of co-defendant Fort at his residence, 530 Calhoun Avenue and his place of employment, Niblocks Bar. The telephone company records from Chicago, Illinois, reflected that phones under the dominion and control of Pantaz were used to make telephone calls to phones which were accessible to co-defendant Ford.

QUESTIONS PRESENTED

1. THE ARREST OF PANTAZ WAS ILLEGAL UNDER CURRENT FOURTH AMENDMENT STANDARDS.
2. THERE WAS NO NON-HEARSAY EVIDENCE TO ESTABLISH APPELLANT'S KNOWING PARTICIPATION IN THE CONSPIRACY.

ARGUMENT

POINT I

This Court has had countless opportunities to review the Fourth Amendment claims of many defendant-appellants. In this particular case, the officers had nothing on which to base their warrantless arrest of Pantaz. The mere fact that Pantaz was associated with known conspirators or suspected drug dealers does not per se make him a drug dealer or a conspirator. The Supreme Court of the United States, in Beck v. Ohio, 379 U.S. 89, declared a search illegal and the police knew that the defendant had a previous record of arrest and convictions for policy. In this case, the arresting officers admit they had never seen Pantaz before, never talked to him and in fact, never heard his name mentioned. This arrest was simply made because Pantaz showed up with the right people at the wrong time.

Every lawyer in arguing a search and seizure case is glad to call the court's attention to a statement made by the Supreme Court of the United States in U.S. v. DiRe, 332 U.S. 581, when the Court stated, "A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

POINT II

As this court stated in United States v. Geaney, 417 F. 2d 1116, 1120 (2nd Cir. 1969):

"The judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances."

It is respectfully submitted that the non-hearsay evidence in the case fell woefully short of that standard.

In United States v. Fantuzzi, 463 F. 2d 683, 690 (2d Cir. 1972), quoting from United States v. Ragland, 375 F. 2d 471, 477 (2d Cir. 1967), this Court reiterated that mere "association with an alleged conspirator, without more, is insufficient to establish the necessary foundation for the admissibility of the incriminating statements..."

Any evidence tying Pantaz in with any of the other co-conspirators occurred after his arrest.

It would seem, as a matter of logic, that if the drug enforcement agents did not have probable cause to arrest Pantaz, then the conspiracy charge should also fall. Cases are legion in this circuit and elsewhere that a conspiracy is terminated upon the arrest of the conspirators. Krulewitch v. United States, 336 U.S. 440.

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Therefore the Court adopts either of Pantaz' arguments it would be sufficient to sustain a reversal. Accordingly,

there is no need to argue on the insufficiency of the evidence,

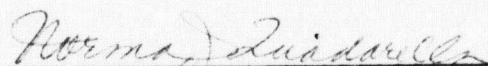
Affidavit of Service by Mail

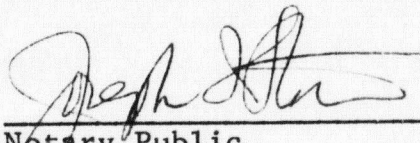
STATE OF NEW YORK)
COUNTY OF NEW YORK)SS:

NORMA J. QUADARELLA, being duly sworn, deposes
and says: that deponent is not a party to the action, is
over 18 years of age and resides at 2049 20th Lane,
Brooklyn, New York.

That on the 6th day of October, 1977, deponent
served the within Brief upon Robert B. Fiske, Esq., United
States Attorney for the Southern District of New York, at
One St. Andrew's Plaza, New York, New York, the address
designated by said attorney for that purpose by depositing
a true copy of same enclosed in a postpaid properly addressed
wrapper in an official depository under the exclusive care
and custody of the United States post office department
within the State of New York.

Sworn to before me this
6th day of October, 1977.


NORMA J. QUADARELLA


Notary Public

JOSEPH L. STONE
NOTARY PUBLIC, State of New York
No. 2831667
Qualified in Nassau County
Commission Expires March 30, 1979

JOSEPH L. STONE
NOTARY PUBLIC, State of New York
No. 2831667
Qualified in Nassau County
Commission Expires March 30, 1979

because unless Pantaz is successful in one of the above arguments, he will be a failure in all others.

CONCLUSION

The agents did not have probable cause to arrest Pantaz; there was insufficient "independent evidence" to sustain a conspiracy, and accordingly the judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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RE.2-2270

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